

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

MARGY M. PHELPS-ROPER,

Plaintiff,

v.

JON BRUNING, Individually and in his
Official Capacity as Attorney General of
the State of Nebraska, COLONEL

BRYAN TUMA, Individually and in his
Official Capacity as Superintendent of
the Nebraska State Patrol, L.

KENNETH POLIKOV, Individually
and in his Official Capacity as Sarpy
County Attorney, LEONARD

HOULOOSE, Individually and in his
Official Capacity as Chief of the
Papillion Police Department, DONALD

KLEINE, Individually and in his
Official Capacity as Douglas County
Attorney, ALEX HAYES, Individually

and in his Official Capacity as Chief of
the Omaha Police Department, and

JOHN STACEY, Individually and in his
Official Capacity as Chief of the
Bellevue Police Department,

Defendants.

4:10CV3131

MEMORANDUM AND ORDER

On this date I held a telephonic hearing at which counsel for all parties entered their appearance. Prior to such hearing, counsel were asked to consider whether in light of the holdings in *Texas v. Johnson*, 491 U.S. 397 (1990) and *United States v. Eichman*, 496 U.S. 310 (1990), I am bound to restrain future enforcement of [Neb. Rev. Stat. § 28-928](#) (making mutilation of a flag a Class III misdemeanor) as applied to Plaintiff Margy “Megan” M. Phelps-Roper and members of her church, so long as they otherwise act peacefully while desecrating the American or Nebraska flag during their religiously motivated protests. (Filings [34](#), [42](#), [46](#).)

At the hearing, Defendants and all of them consented to the issuance of a declaration that the statute, [Neb. Rev. Stat. § 28-928](#), as applied to Plaintiff Margy “Megan” M. Phelps-Roper, is unconstitutional¹. Defendants and all of them further consented to the issuance of a permanent injunction barring future enforcement of [Neb. Rev. Stat. § 28-928](#) as applied to Plaintiff and members of her church, the Westboro Baptist Church, so long as Plaintiff and members of her church otherwise act peacefully. To be clear, this concession on behalf of the Sarpy County Attorney does not pertain to the pending prosecutions in *State v. Shirley Phelps-Roper* in the Sarpy County Court under Case Nos. CR07-5060 and CR07-5061. Defendants made no other concessions or admissions, and Defendants specifically made no concession or admission regarding attorney fees or costs. Plaintiff accepted Defendants’ concessions. I accepted Defendants’ concessions and decided that any other matters raised in the amended complaint (filing [19](#)) are now moot.²

Therefore,

IT IS ORDERED that:

1. Except for the matters described below, this case is now moot and should be dismissed. However, the Clerk of Court is directed not to terminate this case

¹See Defendants’ written consents at Filings 47-51.

²I appreciate the candor and civility exhibited by all counsel during these proceedings.

until a final judgment is entered;

2. Pursuant to the holdings in [Texas v. Johnson, 491 U.S. 397 \(1990\)](#), and [United States v. Eichman, 496 U.S. 310 \(1990\)](#), [Neb. Rev. Stat. § 28-928](#), as applied to Plaintiff Margy “Megan” M. Phelps-Roper, is unconstitutional;
3. Effective today, a permanent injunction is entered against Defendants and their agents, servants, and employees and those acting in concert with them, barring enforcement of [Neb. Rev. Stat. § 28-928](#) as applied to Plaintiff Margy “Megan” M. Phelps-Roper and members of her church, the Westboro Baptist Church, so long as Plaintiff and members of her church otherwise act peacefully while desecrating the American or Nebraska flag during their religiously motivated protests;
4. Entry of final judgment shall be withheld pending resolution of Plaintiff’s request for attorney fees and costs;
5. Plaintiff shall file an application for attorney fees and costs pursuant to the Local Rules of the United States District Court for the District of Nebraska within 60 days of the date of this order. Defendants shall file a response within 60 days thereafter, and Plaintiff shall submit a reply within 15 days thereafter.

DATED this 19th day of July, 2010.

BY THE COURT:

Richard G. Koff

United States District Judge

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